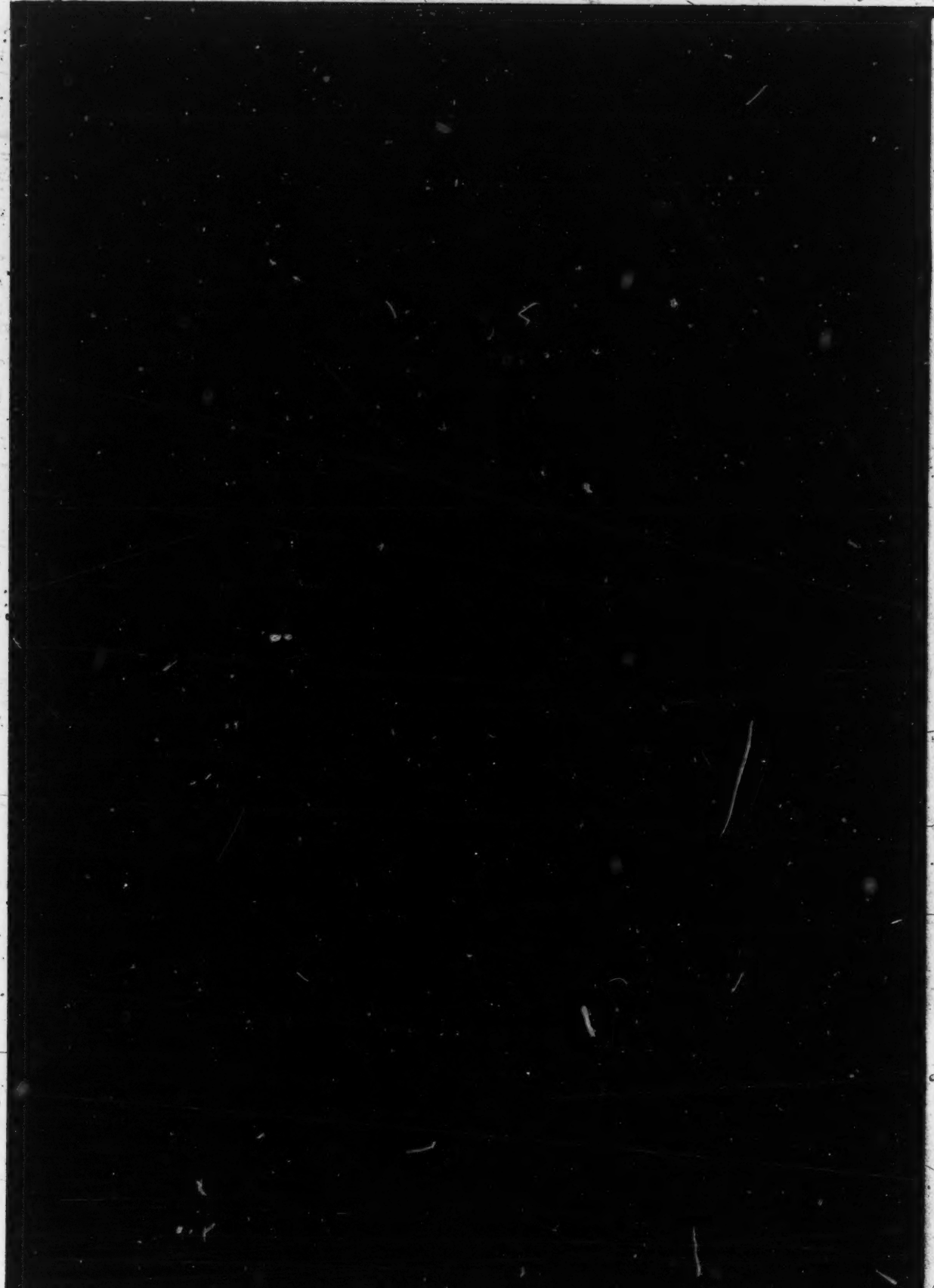

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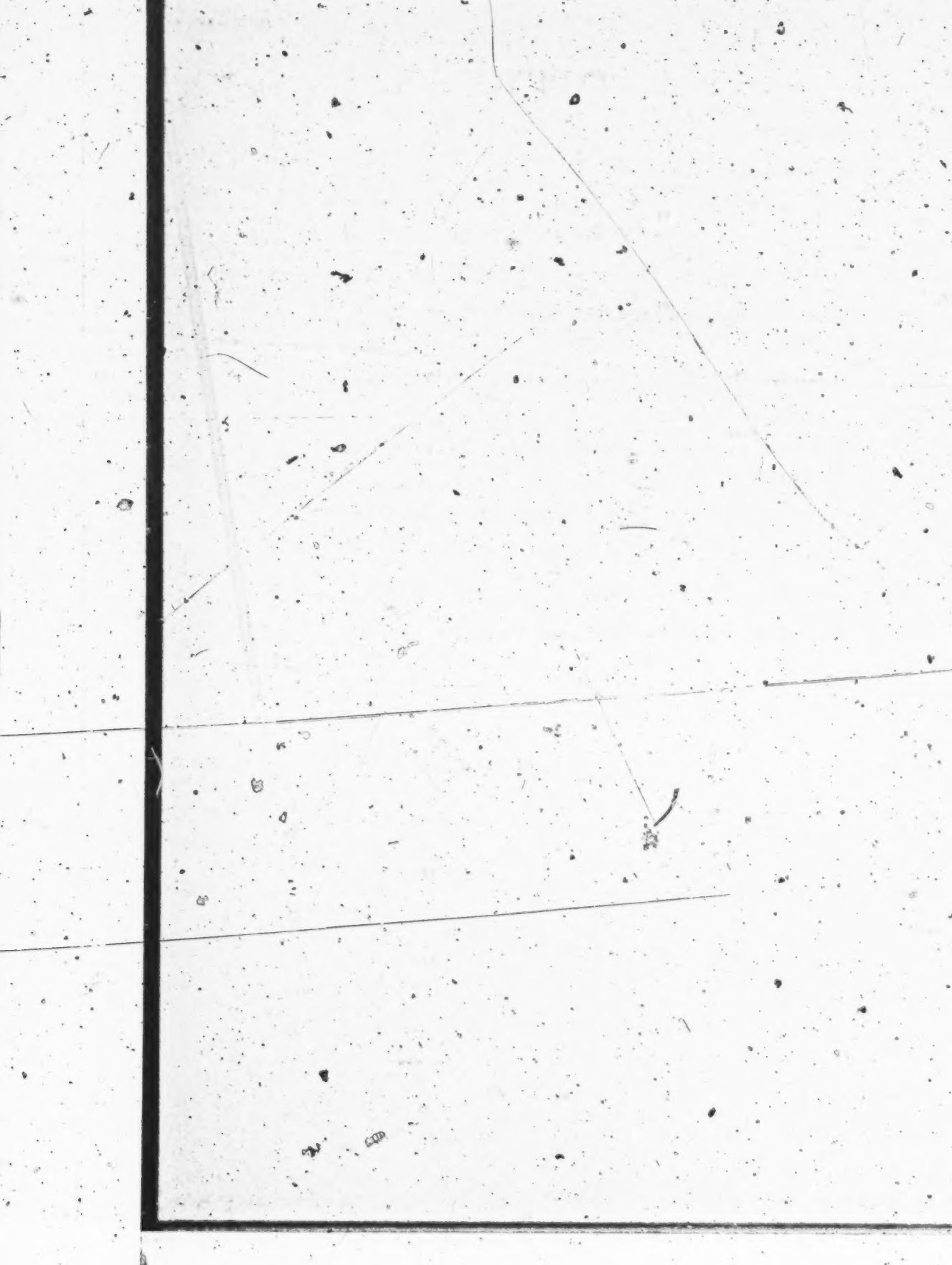

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. _____

KENNETH A. BURKE, dba RANCH ACRES LIQUORS; J. A. CHANDLER, JR., dba CHANDLER RETAIL LIQUORS; WILLIAM E. MANLEY dba TWENTY-FIRST & HARVARD LIQUOR STORE; JESSE B. RENICK dba PENNINGTON HILLS LIQUOR STORE; SARAH SIMPSON KEEL dba WAREHOUSE LIQUOR STORE; and C. J. WRIGHT, JR., dba WRIGHT'S BEVERAGE STORE,

Petitioners,

vs.

CLARENCE FORD and FRANK J. KUNC, dba ALL BRANDS SALES COMPANY; GEORGE S. FARHA and JOHNNY MONSOUR, dba CAPITOL BEVERAGE COMPANY; ZEAK NAIFEH and BOB NAIFEH, dba CENTRAL LIQUOR COMPANY; W. T. MILAM, dba FAMOUS BRANDS WHOLESALE LIQUOR CO.; GLEASON ROMANS, dba GLEASON ROMANS COMPANY; JOE R. JARBOE, dba JARBOE SALES COMPANY; KENNETH AMBROSE, III, dba LEADER LIQUOR COMPANY; TOM CONWELL, dba MIDWEST DISTRIBUTORS; KENNETH COOKSON, SR., dba PIONEER WHOLESALE LIQUOR DISTRIBUTORS; FARRIS P. SAFFA and GEORGE P. SAFFA, dba SAFFA BEVERAGE COMPANY; L. D. BRITTAIN, dba SOUTHWEST DISTRIBUTING COMPANY; ROSCOE THOMPSON, JERRY THOMPSON and PAT THOMPSON, dba THOMPSON'S DISTRIBUTING COMPANY; CARL AVERY, dba TOPS LIQUOR DISTRIBUTORS; H. D. GRIMSHAW, dba UNITED BEVERAGE CO., OKLAHOMA CITY; W. R. GRIMSHAW, JR., dba UNITED BEVERAGE COMPANY; and K. E. NAIFEH, dba WESTERN DISTRIBUTING COMPANY,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI

The United States Court of Appeals, Tenth Circuit, stated in their opinion as follows:

"We affirm on the sole ground that the proof was entirely insufficient to show that the activities complained of were in or adversely affected interstate commerce." (Appendix, Page 3)

The critical issue in this case, as pointed out by the Circuit Court of Appeals, is whether the interstate movement of the alcoholic beverages ends at the wholesaler's warehouses or whether the warehousing of the alcoholic beverages is "a temporary stopover in a continual flow of commerce which terminates at some point farther down the distribution line." (Appendix, Page 5)

The Court held "that the decision on the in commerce issue is controlled by *Walling* v. *Jacksonville Paper Company*, 317 U. S. 564." (Appendix, Page 5)

The Court then reasoned that under *Walling*, in order for petitioners to prevail in the present case, the respondent wholesaler's purchases of alcoholic beverages from out-of-state distillers must fall within one of the following three categories: "(1) to fill a special order, (2) under a contract or understanding by which the wholesaler has agreed to fill the needs of a particular customer; or, (3) to fill the anticipated needs of a particular customer although no contract or understanding to do so exists." (Appendix, Page 7)

Petitioners submit that even under the narrow construction placed on *Walling* by the Circuit Court, the evidence in this case clearly shows that the respondent wholesalers, after entering into the agreement to limit brands and territories among themselves, commenced purchasing alcoholic beverages from out-of-state distillers so as to fill the anticipated needs of their particular customers. Indeed, the very purpose of the agreement among the wholesalers was to cut inventories to a minimum and order only as necessary to meet the anticipated needs of their particular customers. As recognized by the trial court, "the arrangement that was made, or whatever it was that they (wholesalers) did, was for understandable, sound business reasons," * * * "that the tremendous load of inventories and the cost of inventories to the wholesalers was such that they had in some form or manner to reduce inventories and reduce overhead in order to stay in business; and, of course, under the law they are entitled to make a profit. All businesses are." (Transcript of Record, Page 438.)

Certainly, as the record in this case indicates, the purchasing and selling practices of the Respondent, Wholesale Liquor Dealers in Oklahoma, are far different from those of the typical local merchant such as the grocery store, drug store, or clothing merchant. The alcoholic beverages in this case cannot be classified, as the Circuit Court of Appeals has done, as the type of merchandise described by Mr. Justice Douglas in *Walling* as "goods acquired and held by a local merchant for local disposition." (Transcript of Record, Pages 7-8)

Prior to the time the wholesalers divided brands and territories among themselves, each of the wholesalers through sales personnel solicited orders from retailers in various parts of the State of Oklahoma for all of the leading brands of alcoholic beverages. Following the commencement of the territory and brand division, the wholesalers solicited and received orders for only the brands they were to handle and only in the territories in which, by agreement, they had limited their market. (See testimony of respondent wholesalers, Transcript of Record, 84-106, 107-124, 126-140, 343-358, 360-361, and see also testimony of retailers, Transcript of Record, 204-208, 208-230, 230-241, 242-268, 363-365, 366-370.)

Moreover, the evidence is undisputed that prior to the time the agreement pertaining to division of brands and territories was entered into between respondents, the out-of-state distilleries and their representatives took orders from and transported into the State of Oklahoma alcoholic beverages to all of the respondents. (There are no distilleries in Oklahoma.) After the agreement or understanding had been reached, the out-of-state distilleries and their representatives were limited to selling only to those few wholesale liquor dealers in certain agreed territories to whom their brands had, by agreement among the wholesalers, been allocated. Wholesalers who had previously dealt with certain out-of-state distilleries and their representatives refused to do so after the agreement or division of brands and territories went into effect. (See testimony of distillery representatives, Transcript of Record, 179-187, 189-196, 272-283, 285-291, 295-300, 301-304, 314-319.)

Petitioners submit that the jurisdictional element of interstate commerce is present in this case for the reason that the acts complained of, *i. e.*, those acts on the part of respondents in dividing by agreement or understanding the wholesale market for alcoholic beverages both as to brands and territories, occurred within the "flow" of commerce or "in commerce," as contemplated by *Walling*, where the Court speaks of "a practical continuity of movement of the goods until they reach the customers for whom they are intended." This "practical continuity of movement" concept of interstate commerce is also followed in *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231, *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363, *Foremost Dairies, Inc.* v. *F.T.C.*, 348 F. 2d 674, *Hardrives Co.* v. *East Coast Asphalt Corp.*, 329 F. 2d 868, *Northern California Pharmaceutical Ass'n* v. *United States*, 306 F. 2d 379, and *Las Vegas Merchant Plumbing Ass'n* v. *United States*, 210 F. 2d 732. These cases have followed the modern concept of interstate commerce as laid down by the Supreme Court in *Swift & Company* v. *United States*, 196 U. S. 375, in which case Justice Holmes suggested that "commerce among the states is not a technical legal conception, but a practical one drawn from the course of business."

In attempting to prove the continuity of movement of alcoholic beverages from out-of-state distilleries through the wholesale liquor dealers to the retailers and then the ultimate consumers, petitioners offered testimony from wholesaler's employees to show procedures in soliciting orders from retailers and placing orders with distilleries outside of the State of Oklahoma. The trial judge would not

permit petitioners to fully develop their proof on this aspect of the case. The following excerpt of testimony by a wholesale liquor dealer's employee clearly shows the confusion of the trial court with respect to the "continuous flow" theory and proof of petitioners:

> "Q. Mr. Hawkins, in so far as the importation or the ordering of these brands of beverages from the distillers, would you explain to the Court the procedure in so far as the filling of the orders; in other words, how long does it take from the time you order or place an order with a distiller for you to get it?
>
> "Mr. Ungerman: Object to that as incompetent, irrelevant and immaterial.
>
> "The Court: What does that have to do with this lawsuit?
>
> "Mr. Rizley: Your Honor, our theory is, and this is the law, that we are trying to show that in so far as jurisdiction—and your Honor is concerned about jurisdiction—that this alcoholic beverages is in a continuous, under the anti-trust law, is a continuous flow from outside of the state of Oklahoma.
>
> "The Court: The Court can assume that.
>
> "Mr. Rizley: All right. No further questions.
>
> "The Court: The Court can take judicial knowledge of that." (Transcript of Record, Page 362)

Petitioners made further effort to enlighten the trial judge on the "flow" of interstate commerce or "in commerce" theory of petitioners through the testimony of the general manager for one of the wholesalers. But the Court again refused to hear testimony with respect to the evidence of "continuous flow" of alcoholic beverages from

out-of-state distilleries through Oklahoma wholesalers to retailers and to the ultimate consumers as shown by the following excerpt of testimony:

"Q. And what are your duties? A. General manager.

Q. General Manager? A. Uh huh.

Q. Do you have some authority over the orders that are issued to distilleries? A. Yes, sir.

Q. And did you when you were with Mr. Jarboe? A. Yes, sir.

Q. Mr. Wistrom, during the years you have been in business, have you handled Jim Beam? A. Certainly.

Q. And Kentucky Gentleman? A. Yes, sir.

Q. 10 High? A. Yes.

Q. And you handled most of the leading items that are offered for sale by distilleries in Oklahoma? A. Yes, most of them.

Q. Would you explain to the Court what your procedures are in keeping your stock maintained, ordering new stock and so forth?

"Mr. Undegman: Object to that, incompetent, irrelevant and immaterial, doesn't tend to prove or disprove any issue.

"The Court: What is the purpose of this?

"Mr. Rizley: Well, your Honor, we have the question of the interstate movement, of these beverages. We want to show that they are in continuous flow. That's the law as we see it. This is part of our proof. We want to show what their practices are with respect to bringing it into the state of Oklahoma. It's very material.

"The Court: It strikes me that it goes without saying that it's coming in all the time. You need not prove that." (Transcript of Record, Page 429)

As shown from the excerpts above, the petitioners were led to believe by the remarks of the trial judge that sufficient evidence had been presented to satisfy the judge as to the "continuous flow" theory of the petitioners.

This is further demonstrated by the trial court's remarks when petitioners requested a finding of fact with respect to the continuous flow of alcoholic beverages from distillers outside the State of Oklahoma through the wholesalers to the retailers and to the ultimate consumers. During the argument the following remarks were made by the Court:

"The Court: Again, what is continuous? They have enough to come in to *satisfy their demand.* (Emphasis added.)

"Mr. Rizley: If your Honor was to hold then that the flow was sufficient to satisfy their demand.

"The Court: I wouldn't know. I wouldn't know about that. I think that a wholesaler is going to have or try to have *enough whiskey to meet his requests.* (Emphasis added.)

"Mr. Rizley: We would be satisfied if you would just hold that there is a continuous flow from the distillers outside to the wholesalers.

"The Court: I think that's just a play on words. The appellate court will know that if it comes in, it comes in as fast as they want it to come in and as fast as they need for it to go out. It comes in faster than it goes out because some of it is left in the warehouse." (Transcript of Record, Page 446)

Further remarks of the Court during argument on the "continuous flow" finding are as follows:

"The Court: Well, no. What I think I was trying to say was that all this whiskey comes from outside the state and it is coming in here by carload or truckload lots, *continuously, as it is used;* but then for it to go out is another thing. (Emphasis added.)

"Mr. Rizley: May we ask your Honor to do this, to state as a finding there is a continuous flow of alcoholic beverages from distillers outside the state of Oklahoma to the wholesalers.

"The Court: Well, that's in there. There isn't any question about that. That's in there.

"Mr. Rizley: I believe the evidence supports the further finding that in fact it is a continuous flow through the wholesalers to the ultimate consumer, since this moves very rapidly.

"The Court: Well, it's true, but what is the degree? It doesn't breeze through there like the spring wind.

"Mr. Rizley: Your Honor would not let us introduce evidence as to just how long. That was the type of evidence we were trying to get not only from the witness whom I just quoted but also again on the final day of hearing we attempted to—a witness testify as to the procedures showing the movement from out of the state to the retailer.

"The Court: Well, Mr. Rizley, the inventories that are filed with the Alcohol Tax Board shows what they have this month, what they had left over, what came in that month. The record is replete with evidence as to warehouse storages. That's what I was talking about.

> This Court would take judicial knowledge of the fact that it comes in, it stays in, they inventory it, the record will show what went out and what was left, month after month. I think that's what I had reference to. Am I not right about that?" (Transcript of Record, Pages 444-445)

As the Court indicated above, the record in this case contains evidence as to the volume of alcoholic beverages imported into the State of Oklahoma each month by the wholesalers. The fact that the rules of the Alcoholic Beverage Control Board require that the goods be placed in a warehouse for inventory prior to delivery to retailers does not mean that the goods have come to rest and, therefore, are no longer, "in commerce" or in the "flow" of commerce. The goods at the time they were placed in the warehouse for inventory purposes have not yet reached "their final destinations." The goods have not yet reached "the customers for whom they are intended." As the Circuit Court recognized, insofar as the regulation of goods moving in commerce is concerned, "Congress exerted the full measure of its in commerce powers." (Appendix, Page 6)

CONCLUSION

The judgment of the District Court and the opinion of the Court of Appeals for the Tenth Circuit affirming the judgment place undue restrictions upon the Sherman Act never contemplated by Congress or by the United States Supreme Court in its *Walling* decision. In order to correct this error, this Court should act favorably upon this petition for a writ of certiorari.

Respectfully submitted,

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